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Counter-Statement of Question Presented for Review

A single question arises on the facts of this case:

May a school district that obeys a federal court order requiring it to implement a new student assignment plan to accomplish desegregation, consistent with the Fourteenth Amendment and equitable principles, dismantle that plan, and thereby re-create the all-Afro-American schools whose elimination was the purpose of the court order, when the uncontroverted evidence demonstrates that the conditions that made the order necessary (racial residential segregation that the court determined to have resulted from official state action including action of the school authorities) yet persist?

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No. 89-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA,

Petitioner,

v.

ROBERT L. DOWELL, *et al.*

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF FOR RESPONDENTS

OPINIONS BELOW

In addition to the opinions listed by Petitioner, the following opinions of the United States District Court for the

Western District of Oklahoma and the Court of Appeals for the Tenth Circuit are relevant to the decision of this case. 219 F. Supp. 427 (1963); 244 F. Supp. 971 (1965); 307 F. Supp. 583 (1970); 338 F. Supp. 1256 (1972); 606 F. Supp. 1548 (1985)(J.A. 177-196); 375 F.2d 158, *cert. denied*, 387 U.S. 931 (1967); 465 F.2d 1012, *cert. denied*, 409 U.S. 1041 (1972); 795 F.2d 1516, *cert. denied*, 479 U.S. 938 (1986)(J.A. 197-214).

STATEMENT

A. Early Stages of the Litigation

This action was brought in 1961 by Afro-American children and their parents to end the *de jure* segregation of the public schools in Oklahoma City, Oklahoma. Prior to *Brown v. Board of Education*, 347 U.S. 483 (1954)(*Brown I*) separate schools for Afro-American and white students had been required by the constitution of Oklahoma since its

admission into the Union as a "Jim Crow State" in 1907. *Dowell v. School Bd. of Oklahoma City Public Schools*, 219 F. Supp. 427, 431 (W.D. Okla. 1963).[1]

Shortly after *Brown v. Board of Education*, 349 U.S. 294 (1955)(*Brown II*), the Oklahoma City School Board adopted, for the first time, a plan of neighborhood schools, ostensibly to end segregation. However, all the plan did was to impose local attendance zones on housing that was rigidly segregated by race. The pattern of residential segregation had been created by statute, through the enforcement of restrictive covenants until the decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948),[2] and by other practices of the state, city, and school district. As the district court found:

---

[1] Racially separate schools had evidently been in place before statehood as well. 219 F. Supp. at 434, quoting the Oklahoma City School Board's 1955 "Statement Concerning Integration."

[2] See *Dowell v. School Bd. of Oklahoma City*, 244 F. Supp. 971, 975 (W.D. Okla. 1965).

> The residential pattern of the white and Negro people in the Oklahoma City school district has been set by law for a period in excess of fifty years, and residential pattern has much to do with the segregation of the races. . . . Thus the schools for Negroes have been centrally located in the Negro section of Oklahoma City, comprising generally the central east section of the City. . . . The patrons of the School district had lived under a dual school system and the children's residential areas were fixed by custom, tradition, restrictive covenants and laws.

219 F. Supp. at 433-434. Indeed, the establishment of neighborhood schools intensified patterns of residential segregation, with white families moving out of the east central area of the city where Afro-Americans were concentrated, and Afro-Americans moving in. Moreover, even those white families who remained in the Afro-American ghetto were allowed to transfer their children from their school attendance areas to areas where whites predominated in the schools. In light of these facts, the court concluded that the defendants had not made a good faith effort to integrate the schools. *Id.* at 434-35.

Two years later, the district court again found the school district's proposed integration plan wholly inadequate because it adhered to a neighborhood school policy, and:

> . . . such a policy when superimposed over already existing residential segregation initiated by law in Oklahoma City, leads inexorably to continued segregation. . . . [I]nflexible adherence to the neighborhood school policy in making initial assignments serves to maintain and extend school segregation by extending areas of all Negro housing, destroying in the process already integrated neighborhoods and thereby increasing the number of segregated schools.

Dowell v. School Bd. of Oklahoma City, 244 F. Supp. 971, 976-77 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967).

B. The 1972 Desegregation Order

In 1972 the district court held that the desegregation plan put into effect by the school district in 1970 had been ineffective and that the school board had "totally defaulted in its acknowledged duty to come forward with an acceptable

plan of its own." *Dowell v. School Bd. of Oklahoma City*, 338 F. Supp. 1256, 1271 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied,* 409 U.S. 1041 (1972). Indeed, the plan was *not* "the plan approved by [the] court" since "the Defendant School Board, without notice to or permission to the court, [had] proceeded to emasculate the plan." *Id.* at 1262, 1263. With regard to elementary schools in particular, the school board's plan resulted in 69 ~~of 86~~ schools remaining 90% or more predominantly white or Afro-American. *Id.* at 1260. Sixteen of those schools were virtually all-Black, with white enrollments from 0 to 1.7%. Again, the vice of the school board's approach was that it imposed a neighborhood school plan on segregated residential patterns.

Finding that the school board's plan "will not work" to desegregate the schools and eliminate the vestiges of segregation, the district court adopted the plaintiffs' plan

(The Finger Plan) and held that it "would, if adopted and implemented in good faith, create a unitary system." *Id.* at 1269, 1271. The Finger Plan utilized a variety of methods, including grade restructuring and school clustering, transportation, restructuring of school boundaries, and feeder schools to integrate fully the elementary, junior high, and high schools. The district court's order was affirmed on appeal, and the Finger Plan was implemented in the Fall of 1972.

C. The 1977 "Unitary" Order

The Finger Plan desegregated the schools of Oklahoma City at all levels. In its 1972 order, the district court required that:

> The Defendant School Board shall not alter or deviate from the [Finger Plan] . . . without the prior approval and permission of the court. If the Defendant is uncertain concerning the meaning of the plan, it should apply to the court for interpretation and clarification.

338 F.Supp. at 1273. This order was not vacated until 1987. In 1975, the Board of Education filed a motion requesting dismissal of the lawsuit on the ground that the School District had complied with the 1972 order. At a hearing held on November 18, 1975, the then president of the school board testified that the board did not seek dismissal of the case in order to return to segregated schools.

> [THE COURT:] The Court would like to ask you, if the Court should terminate its jurisdiction, will this mean that the Board will terminate its busing program for desegregation?
>
> THE WITNESS: No, sir.
>
> THE COURT: Would it mean that you would lessen your busing program to any degree?
>
> THE WITNESS: No, sir.
>
> THE COURT: Do you know of any other way in which you can bring about desegregation except through busing?
>
> THE WITNESS: I think that it's certainly going to require transportation of some sort, busing of some

> nature.

Plaintiffs' Exhibit ("PX") 55 (Transcript of hearing of November 18, 1975, p. 69) (J.A. 103-04).

Subsequently, on January 18, 1977, the district court entered an "Order Terminating Case" that recited that the Finger Plan:

> worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and *the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished* over the 16 years during which the cause has been pending before the Court.
>
> . . . The Court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements. (Emphasis added.)

(J.A. 174-75.)

Although the case was dismissed, the permanent injunction was not dissolved. For eight more years the

expectation of the court and of plaintiffs was fulfilled, and the school district continued to operate a desegregated school system under the Finger Plan until the 1985-86 school year.

D. The Dismantling of Elementary School Desegregation

Over the course of implementing the Finger Plan, the greatest part of the burden of busing for integration of the elementary schools fell on Afro-American students. Under the plan, formerly Afro-American schools became fifth-year centers serving only the fifth grade and kindergarten. As a result, Afro-American elementary-grade children living in the northeast quadrant and other predominantly black areas of Oklahoma City were transported four out of five years, while white students were bused only in the fifth grade. Witnesses for both plaintiffs and defendants agreed that this was inequitable. Transcript of Hearing, June 15-24, 1987 ("Tr."), pp. 220; 292; 385; 432-33; 512; 642; 1265; 1412-

13; 1431-33 (J.A. 283-83; 303-04; 330; 341-42; 347; 384; 501; 516-18; 521-23.)

The inequity resulted in part from the failure of the school board to change student assignments to add grades to schools in the northeast quadrant, although this was suggested by the school system's research staff. Tr. 498-99 (J.A. 345-46). The school district's own expert witness testified that in light of the demographic change, the addition of grades would have been essential to maintain integration with a minimum amount of busing. Tr. 292-93 (J.A. 303-04).

Another source of inequity was the "stand-alone" school feature of the Finger Plan and the manner in which it was administered by the school district. Under the plan, any elementary school within a grade-restructured cluster that could itself be desegregated, by establishing a contiguous geographic attendance zone around the school that would

result in a student body more than 10% but less than 35% Afro-American, would be withdrawn from a grade-restructured cluster of schools, and would operate as a school enrolling grades K-5.[3] Because of demographic patterns, the creation of "stand-alone" schools in certain areas could lead to the closing of schools in the northeast quadrant, where the Afro-American population was concentrated, and to increased busing of students living in that quadrant.[4]

---

[3] Under the Finger Plan the clustered schools were divided into ones that served Kindergarten and grade 5, and ones that served grades 1-4. All Kindergarten children went to schools in their own neighborhoods, Afro-American children were bused when they were in grades 1-4, and white children were bused when they were in grade 5. A "stand-alone" school served all children in grades K-5 who lived in a contiguous geographic attendance zone that produced a desegregated student body.

[4] White students in grade 5 were bused into schools in the Afro-American neighborhood. Therefore, the creation of "stand-alone" schools in predominantly white neighborhoods reduced the number of fifth graders available for transportation, and therefore reduced the total student body of schools in Afro-American areas. Once the student body fell below to a certain level, a school was closed. At the same time, the conversion of a school that was near an Afro-American neighborhood to "stand-alone" status meant that Afro-American students in grades 1-4 would have to be bused longer distances to another clustered school.

In 1984, the school board decided to establish the Bodine Elementary School as a K-5 "stand-alone" school. Defendant's Exhibit ("DX") 76 (J.A. 586). Dr. Clyde Muse, an Afro-American school board member, expressed concern about the increase of the already inequitable busing burden on Afro-American students from the northeast quadrant. The school board established a committee to examine the question, and in its report of November 19, 1984, the committee recommended that K-4 neighborhood schools be established throughout the district. PX 9.

The committee and the school board were fully aware that the elimination of the Finger Plan's clustering approach for the elementary schools would result in reestablishing elementary schools that had heavily Afro-American or non-Afro-American student enrollments.[5] Nevertheless, on December 17, 1984, and without notification to or approval

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[5] DX 79, p. M-3 (Minutes of Board of Education meeting, November 19, 1984)(J.A. 602-08).

by the district court as required by the outstanding permanent injunction, the Board of Education approved the plan, dismantling the Finger Plan's clustering approach and substituting geographically zoned "neighborhood" schools serving grades K-4. Although some portion of the Afro-American community supported the abandonment of clustered schools, their support was based on the reduction of the inequitable busing burden on Afro-American children and the retention of elementary schools in the northeast quadrant. Tr. 642 (J.A. 384). However, other Afro-American parents objected to the new plan because it would result in re-segregating the district's elementary schools. PX 56, M-5; Tr. 512; 1412-13; 1431-33 (J.A. 552-60; 347; 517-18; 521-23).

The plan adopted in 1985 remains in effect today. The elementary school zones established by the 1985 plan are the same as those used in 1971 and earlier, except for

modifications necessitated over the years because of school closings. As the following table demonstrates, ten schools that were *segregated* in 1971, but that were *desegregated* from 1972 until 1984-85 by the Finger Plan, were *resegregated* in 1985 by the unilateral abandonment of the Finger Plan and the re-imposition of neighborhood zones on segregated housing.

School	% Afro-American Enrollment		
	1971-72[6]	1984-85[7]	1985-86[8]
Creston Hills	100.0	41.4	99.0
Dewey	99.2	33.5	96.6
Edwards	99.7	29.7	99.5
Garden Oaks	100.0	36.9	99.0
King (formerly Harmony)	99.7	43.2	99.7
Lincoln	99.1	36.9	97.2
Longfellow	99.3	32.2	99.6
Parker	99.7	72.3	97.3
Polk	97.8	31.6	98.4
Truman	100.0	27.6	98.7

[6] Source: 338 F. Supp. at 1260.

[7] Source: PX 50 (J.A. 543-45).

[8] Source: 677 F. Supp. at 1510.

All of the above schools except Parker are located in the northeast quadrant. Moreover, in 1971 the attendance zones of Creston Hills, Dewey, Dunbar, Edison, Edwards, Garden Oaks, Lincoln, Longfellow, Page, and Woodson defined the outer boundaries of the northeast quadrant. In 1985-86 the same geographic area was defined by the attendance zones of Creston Hills, Dewey, Edwards, Garden Oaks, Lincoln, and Longfellow. Thus, when allowances are made for the closing of some schools, the elementary school zones under the plan adopted in 1985 are operationally the same as those used before 1972. As described above, it was the segregative effect of neighborhood zones on this very area that was the basis for rejecting neighborhood schools in 1972.

The immediate consequence of the new plan was that, in the school year 1985-86, 40% of the Afro-American children in grades 1-4 attended these ten virtually all-black

schools. Overall, 44.7% of the district's Afro-American pupils in those grades attended schools with enrollments greater than 90% Afro-American,[9] in a school system in which 36% of the elementary school children are Afro-American.[10]

E. The Plaintiffs' Motion to Reopen the Case

On February 19, 1985, immediately after the adoption of the neighborhood school plan, plaintiffs (respondents here) moved to reopen the case to challenge the plan's validity. After a hearing, the motion was denied on the ground that "once a school system has become unitary, the task of a supervising federal court is concluded." 606 F. Supp. 1548, 1555-56 (W.D. Okla. 1985)(J.A. 192). The Tenth Circuit reversed and remanded the matter with instructions for the

[9] PX 26, 27.

[10] 677 F. Supp. at 1510.

district court to determine whether "changed conditions require modification or [whether] the facts or law no longer require the enforcement of the [1972 injunctive] order." 795 F.2d 1516, 1523 (10th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986)(J.A. 213).

On remand from the court of appeals the district court granted the motion to reopen and held a hearing from June 15 through June 24, 1987. At the hearing the school board had the burden of demonstrating sufficiently changed conditions to justify the dissolution of the permanent injunction. An issue central to the district court's decision was whether the continuing residential segregation, and particularly the virtually all-Afro-American northeast quadrant in which the elementary schools in question were still located, continued to be the result of the prior actions of various governmental agencies, including the school board. In other words, the issue was whether the effects of the prior

unlawful discrimination and segregation had become so attenuated as to no longer contribute to the still-existing housing segregation.

Petitioner's chief witness with regard to this issue was William Arthur Valentine Clark, a professor of geography at the University of California at Los Angeles. Dr. Clark was qualified as an expert in population geography and demography and testified as to population movements in Oklahoma City. He first testified that the original concentration of Afro-Americans in certain sections of the city was due in substantial part to city ordinances that restricted the areas in which they could live.[11] However, he said that beginning in 1968 and continuing into the 1970's the passage of fair housing laws at the federal, state, and local levels removed the legal barriers to Afro-Americans

[11] Professor Clark testified that such ordinances were in force as late as the 1930's. Tr. 46 (J.A. 236). Of course, this Court had held that such laws were unconstitutional in 1917. *Buchanan v. Warley*, 245 U.S. 60 (1917).

living in other parts of the city, with the result that by the early 1980's there had been a dispersal of Afro-American families into previously all-white areas. However, the East inner part of city remained virtually all-Afro-American, although a smaller proportion of the total Afro-American population resided there than previously.[12]

On direct examination Dr. Clark expressed the opinion that the all-Afro-American tracts in the East inner section were not a vestige of state actions of 30 to 40 years ago. However, on cross-examination Dr. Clark reiterated his testimony that whites would not move into areas where the Afro-American population was above 20-25%; indeed, whites tend to move *out* of neighborhoods that reach around 30% Afro-American.[13] Therefore, it was Dr. Clark's opinion that whites would not be expected to move into the

[12] Tr. p. 67 (J.A. 246).

[13] *Id.*, at 105 (J.A. 257-58).

established Afro-American residential areas and, consequently, into the newly established school attendance zones.[14] Thus, the past official segregatory actions resulted in Afro-American neighborhoods into which whites would not move.

> Q. And does it not therefore follow that, to the extent that past discrimination was a factor in establishing concentrated minority residential areas, that those areas are unlikely to change because of the antipathy of whites to moving in unless and until their black residents move somewhere else?
>
> A. I think that you would have to agree with that, given what I've testified. Yes.
>
> * * *
>
> Q. . . . [A]s long as school attendance is determined by residential zones, such as those which have been drawn which overlay areas of established black concentration, you wouldn't anticipate white families moving into those areas?
>
> A. I would not anticipate white families moving in. No.[15]

[14] *Id.* at 106 (J.A. 258).

[15] *Id.*, at 106-107 (J.A. 258-60).

The testimony of one of respondents' witnesses, Professor Mary Lee Taylor, fully corroborated this conclusion of Dr. Clark. Dr. Taylor noted that while Afro-Americans had moved into formerly all-white areas, the reciprocal change had not occurred. The reason was that "white residents are not going to move into historically black areas."[16] This is particularly true where white aversion to moving into a heavily Afro-American neighborhood is tied to a history of official discrimination and segregation, including the maintenance of segregated schools.

> A. Yes, I think there's a lot of evidence that white attitudes about desegregation are, in fact, shaped by the history of segregation that those whites have been exposed to. . . . [I]n places like Oklahoma City, where the black neighborhood was created by state action, the involvement of public officials, the fait accompli phenomenon implies that white avoidance of desegregation would be particularly great for that reason. In other words, the official segregation encourages attitudes that . . . segregation is appropriate, justified, that it . . . would be undesirable for whites to live in

[16] *Id.*, at 1231 (J.A. 490-91).

predominantly black neighborhoods.[17]

Respondents also put on the testimony of Gordon Foster, an expert in the areas of school administration and school desegregation planning and implementation. Dr. Foster presented an alternative desegregation plan that would modify the Finger Plan to alleviate the inequitable burdens on Afro-American school children and the Afro-American community while maintaining a fully desegregated system.[18]

F. The District Court's Order

On December 9, 1987, the district court issued its opinion and order dissolving the 1972 decree and relinquishing any further jurisdiction. 677 F. Supp. 1503 (W.D. Okla. 1987). With regard to the question of residential segregation, the court acknowledged the evidence

[17] *Id.*, at 1231-1232; see also *id.*, at 1234-37 (J.A. 490-95).

[18] *Id.*, at 1278-1282 (J.A. 506-10).

that few if any white families would chose to move into the predominantly Afro-American inner city area, but did not mention Dr. Clark's testimony that this reluctance was linked to the creation of the ghetto by official action.[19] The court concluded that the school district had achieved "unitary" status and that therefore the 1972 decree should be dissolved.

The court of appeals reversed primarily on the ground that the petitioner had not made a sufficient showing of changed circumstances that would justify the dissolution of the injunction. The reversion of ten schools to the same total segregation that existed prior to the decree being implemented was inconsistent with a demonstration that "'the dangers the decree was meant to foreclose must almost have disappeared.'" 890 F.2d 1483, 1493 (10th Cir. 1989). The decision of the district court was reversed and the case

[19] 677 F. Supp. at 1512.

remanded for further proceedings. The petitioner sought review from this Court, and certiorari was granted on March, 26, 1990.

SUMMARY OF ARGUMENT

I.

A. School desegregation cases, as cases in equity, are governed by the same principles regarding dissolution or modification of permanent injunctions as are all other cases in equity. Since an injunction is directed to the future, a court in equity retains the inherent power to modify it to adapt to changed conditions. However, that power is governed by the principles enunciated in *United States v. Swift & Co.*, 286 U.S. 106 (1932). Thus, a permanent injunction will not be revoked or modified unless changed circumstances have turned it into "an instrument of wrong." *Id.*, at 115. The mere fact that petitioner would prefer, or

would be better off, if the injunction were relaxed is not sufficient; there must be a "clear showing of grievous wrong evoked by new and unforseen conditions." *Id.*, at 119. No such showing has been made here. The decisions of this Court have made it clear that school desegregation cases are governed by generally applicable equitable principles (*Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)), including the rule of *United States v. Swift & Co.* (*Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 437 (1976)).

B. Even under a standard less exacting than that of *Swift*, petitioner has not shown sufficient justification for relief from the injunction. The reconsignment of 40% of the school system's Afro-American elementary school children to virtually all Afro-American schools is inconsistent with the principles enunciated in *Swann*. The reimposition of neighborhood schools on racially segregated housing caused by state action, including acts of the school district, has

resulted in a school system in which the vestiges of the prior segregated system manifestly have not been eliminated "root and branch"

II.

This case does not present the situation that existed in *Pasadena City Bd. of Educ. v. Spangler*, where a school system was required to readjust school boundary lines periodically in order to maintain "racial balance" in schools in the face of demographic changes in the community. To the contrary, here it was petitioner school board that unilaterally, without notice or permission, abandoned part of a school plan that had effectively and permanently achieved full integration, and returned to zones that recreated precisely the segregation that required the court-ordered plan to begin with. Whatever "unitariness" may mean, it cannot mean be that a school board may resurrect conditions of racial segregation that are beyond the power of a federal

court to remedy in the absence of a finding that the action was taken with invidious discriminatory motivation.

III.

Alternatively, if a finding of "unitariness" means that a school system may make changes in pupil assignments without court review in the absence of racially discriminatory motivation, such a finding must be based on a searching factual inquiry that establishes that *all* the circumstances and conditions that required the imposition of a desegregation decree have disappeared. Thus, there must be a determination that the system will remain unitary in the face of any change in pupil assignment procedures. Such an inquiry and such findings were not made in the present case, and at the least the case must be remanded to the court of appeals for a determination of the meaning of the various findings of "unitariness" made by the district court.

ARGUMENT

Introduction

In order to focus our argument, respondents first wish to point out what this case is *not* about:

1. This is not a "de facto" school case, where there had been a long-standing tradition of neighborhood schools that became racially isolated because of housing patterns unrelated to governmental actions. This is a classic *de jure* case involving a school district that had schools rigidly segregated by law and that adopted neighborhood schools only after *Brown I* and *Brown II*. Moreover, neighborhood schools were imposed on housing that was rigidly segregated as a result of state action, and the adoption of neighborhood schools increased and exacerbated this residential segregation.

2. This is not a "Spangler"[20] *case*, where a district court required the modification of a desegregation plan to accommodate shifting residential patterns that had led to some schools becoming racially unbalanced. Here, there was in place a plan that successfully and completely desegregated all the schools in the district.[21] The school district, without the approval of the district court, abandoned part of it and resegregated ten elementary schools.

3. This case does not involve a "small number of one-race schools" within the meaning of *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971). Forty per cent of Afro-American children in grades 1-4 attend ten schools that are nearly 100% Afro-American. At the same time, thirteen other elementary schools have become more

---

[20] *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976).

[21] Thus, the schools serving grades 5-12 continue to follow the Finger Plan and remain desegregated. In addition, the faculties at all grade levels are currently fully integrated.

than 80% white because of the re-imposition of neighborhood schools.[22]

The sole issue in this case is whether the Oklahoma City school district can abandon an effective desegregation plan, relegate 40% of Afro-American elementary pupils to racially segregated schools, and take no other steps to overcome the vestiges of segregation. We urge that such a result is wholly inconsistent with the promise of *Brown I* and *II*, with the mandate of *Green v. County School Bd. of New Kent County*, 391 U.S. 430 (1968), and with the basic principles of equity applicable to school desegregation lawsuits under *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, *supra*.

[22] *Dowell v. Bd. of Education of Oklahoma City Public Schools*, 677 F. Supp. 1503, 1509-1510 (W.D. Okla. 1987).

I.

SCHOOL DESEGREGATION CASES ARE GOVERNED BY THE EQUITABLE PRINCIPLES ESTABLISHED BY *UNITED STATES v. SWIFT & CO.*

A. *United States v. Swift & Co.* Governs This Case.

It is established equity jurisprudence that a permanent injunction remains in effect and is subject to the court's enforcement and implementation at any time, unless and until it is dissolved pursuant to the procedure and under the standard specified by the familiar rule of *United States v. Swift & Co.*, 286 U.S. 106 (1932). *Swift* recognized that a court in equity retains the power to modify an injunction, which necessarily looks to the future, if the injunction "has been turned through changing circumstances into an instrument of wrong." 286 at 115.[23] It is not enough that

[23] The power exists "by force of principles inherent in the jurisdiction of the chancery." 286 U.S. at 114. As noted in 11 Wright & Miller, *Federal Practice and Procedure*, § 2961, p. 599, the authority "has its roots in the historic power of chancery to modify or vacate its decrees 'as events may shape the need.'" Lord Bacon's Ordinances, adopted in 1618, provided:

(continued...)

the defendants "be better off if the injunction is relaxed;" they must be "suffering hardship so extreme and unexpected as to justify [the court] in saying that they are the victims of oppression." *Id.*, at 119.

> Nothing less than a clear showing of grievous wrong evoked by new and unforseen conditions should lead us to change what was decreed after years of litigation . . . .

Id., at 119. Central to that showing is a demonstration that the changes in circumstances "are so important that dangers, once substantial, *have become attenuated to a shadow.*" *Id.* (Emphasis added).

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[23](...continued)

> No decree shall be reversed, altered, or explained . . . but upon bill of review: and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree without farther examination of matters in fact, *or some new matter which hath risen in time after the decree*, and not any new proof which might have been used when the decree was made: . . . .

7 Bacon, *Works* 759 (Spedding ed. 1879)(emphasis added). Cases as early as 1545 permitted modification of an equitable decree on the basis of new matter. See Developments in the Law, *Injunctions*, 78 Harv. L. Rev. 994, 1080-1086 (1965) and Note, *Finality of Equity Decrees in the Light of Subsequent Events*, 59 Harv. L. Rev. 957-966 (1946).

The holding of *Swift* has been consistently reaffirmed by this Court,[24] and has been applied in a wide variety of circumstances and types of cases by the lower federal courts.[25] The applicability of *Swift* to school desegregation cases was explicitly recognized by this Court in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 437 (1976); that conclusion necessarily flowed from the holding in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, *supra*, that school desegregation cases are governed by the same standards as are all other cases that lie in equity. 402 U.S.

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[24] See, *e.g.*, *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 247-249 (1968)(*Swift* reaffirmed, held not to prevent modification of a decree on petition of *plaintiff* in order to achieve the purposes of the original decree rather than to nullify it); *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961)(*Swift* reaffirmed, held that it was consistent with its principles to modify an injunction to make it consistent with an amendment to a statute that was the basis for the injunction's issuance). The decree in *Swift* itself survived another attempt to modify it in 1960 (*United States v. Swift & Co.*, 189 F. Supp. 885 (D.C. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961)), and was still in force more than 50 years after it was entered. *United States v. Armour & Co.*, 402 U.S. 673 (1971).

[25] See the cases discussed in 11 Wright & Miller, *Federal Practice and Procedure* § 2961 and in 7 Moore, *Moore's Federal Practice* ¶ 60.26[4].

at 15.

Thus, there is no place in school desegregation litigation for a "unitariness" finding that is based on a lesser standard than *Swift*'s and that thereby undoes the permanent character of the permanent injunction that the plaintiffs have won and to which they are entitled upon proof of a constitutional violation. In the present case the finding of "unitariness" in 1977, whatever that elusive term might have meant, left the permanent injunction in full effect and left the district court and the respondents with the expectation that it would be followed by the school district; indeed, the injunction *was* followed in every respect for eight years until it was unilaterally abandoned with regard to the elementary grades in 1984.[26]

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[26] It is because of these facts that the issue of whether respondents are "bound" by the 1977 finding of unitariness because they did not appeal the order is of absolutely no consequence. In short, there was nothing for respondents to appeal, since the order did not by its terms or effect in any way adversely affect their rights. The permanent injunction requiring the implementation of the Finger Plan remained in place and (continued...)

Under these principles, a "unitariness" finding is a convenient instrument for marking the point at which a district court gives up its former active supervision over pupil assignment procedures and other school board actions that affect the racial distribution of students among schools. Upon a finding that the school system has a "unitary" character, the court may properly permit the board to implement such actions henceforth without prior approval. But the board remains under a continuing obligation to maintain a school system from which segregation has been completely and permanently eliminated; and its actions

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[26](...continued)
the district court expressly stated in its order that it did not foresee any "dismantlement of the Plan." In fact there was none until 1984, when the school district abandoned the plan in part without any notice to the court or plaintiffs, and without filing a motion under Rule 60(b), F. R. Civ. Proc. seeking relief from the court's judgment through dissolution or modification of the permanent injunction. It was not until 1985, when the district court retroactively interpreted its 1977 order to mean that plaintiffs had no enforceable rights under the still undissolved permanent injunction, that there was any need or obligation to appeal; the plaintiffs did so and the court of appeals reversed the district court's order. The district court did not actually dissolve the permanent injunction until 1987. 677 F. Supp. at 1526.

remain subject to the court's review for consistency with that obligation.

Thus, once a state or subdivision of a state has been found, as have Oklahoma and the Oklahoma School Board, to have violated the Fourteenth Amendment by deliberately segregating Afro-American children from white children in the public schools, a permanent injunction promising a permanent correction of that constitutional violation is in order. The obligation of the board to conduct its affairs in such a way as to prevent resegregation and the power of the court to review the board's actions to assure that resegregation does not occur are coextensive with the permanent injunction. Of course, as here, the implementation of a fully corrective injunction can lead to the dismissal of the action *without* the dissolution of the

injunction.[27]

Under *Swift & Co.* a school district, like any other equity defendant, can be relieved from a permanent injunction under appropriate circumstances. But those circumstances must amount to a "clear showing of grievous wrong evoked by new and unforseen conditions," 286 U.S. at 119.[28] As the Tenth Circuit properly held, the Oklahoma City Board of Education made no such showing here. *First*, the underlying circumstances that required the terms of the injunction had not changed at all.[29] To the contrary, the

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[27] As noted at n. 24, *supra*, the injunction in *Swift* itself was still in effect in 1971. It is our understanding that there are similarly outstanding permanent injunctions in a large number of anti-trust cases brought by the United States going back to the passage of the Sherman Anti-Trust Act; in the majority of these cases the action has been dismissed, but the injunction remains in force and is enforceable.

[28] The alternative basis for relief from an injunction, a change in the substantive law that gave rise to the need for equitable relief (see *Pennsylvania v. Wheeling & B. Bridge Co.*, 59 U.S. 421 (1856); *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961)), does not apply here.

[29] Thus, continuation of the injunction here as long as the underlying condition of residential segregation persists would "not extend [it] beyond the time required to remedy the effects of past intentional

(continued...)

facts demonstrated that returning to the same neighborhood schools as in 1971 meant the return to the same segregated schools.[30] Since the continuing existence of the Afro-American ghetto, which had been created by official action, was the result of antipathy of whites to moving into an area identified as minority, the vestiges of the prior segregated system remained. *Second*, the justifications advanced by the school board for abandoning the plan in grades 1-4 did not amount to "grievous wrong." Respondents agreed that the burdens on the Afro-American community had been inequitable and put forward alternative plans that would have corrected the inadequacies of the Finger Plan without

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[29](...continued)
discrimination." *Spangler v. Pasadena City Bd. of Ed.*, 611 F.2d 1239, 1245, n. 5 (9th Cir. 1979)(concurring opinion of then Judge Kennedy).

[30] It must be kept in mind that the effect of adopting neighborhood schools in 1955 "was to erect new boundary lines for the purpose of school attendance in a district where no such lines had previously existed, and where a dual school system had long flourished." *Wright v. Council of City of Emporia*, 407 U.S. 451, 460 (1972). Just as in *Wright* both the original adoption of neighborhood school attendance zones as well as their re-adoption in 1977 "must be judged according to whether it hinders or furthers the process of school desegregation." *Id.*

resegregating the schools. The district court held, however, that the respondents were precluded from obtaining any further remedial relief because of the so-called "unitary status" of the Oklahoma City schools, citing the fear of "white flight" if white students were bused and purported additional costs. 677 F.Supp. at 1525-26. In any event, even assuming respondents' plans were faulty in some respect, this in no way relieved the school board from coming forward with its own alternative plan that could both maintain desegregation while correcting any inequities.

B. The School Board Has Failed to Justify Resegregating Schools Under Even a Lesser Standard than *Swift*.

Even if the exacting *Swift & Co.* test were not the applicable standard, the school board has shown no sufficient justification for relief from the injunction that goes so far as to permit the consignment of 40% of Oklahoma City's Afro-

American elementary school children to virtually all-Afro-American schools. Any test for modifying a school desegregation decree must, at the least, be consistent with the general remedial principles announced in *Swann v. Charlotte-Mecklenburg Bd. of Educ., supra*. Under *Swann*, when substantially one-race schools persist or are re-introduced in a school system "with a history of segregation," the court that decreed injunctive relief is required to "scrutinize such schools, and the burden . . . [is] upon the school authorities to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." 402 U.S. at 26.

Here, the board neither did nor could meet that burden. The key question was whether the existing residential segregation that produced the ten all-Afro-American schools was linked to the residential segregation found by the district court to be caused by official actions, including the

imposition of a neighborhood school plan on existing residential segregation in 1955. As described above, in 1967 and 1972 the district court held that neighborhood schools could *not* be used precisely because they exacerbated housing segregation by destroying integrated neighborhoods. Nevertheless, the district court later held that its two "unitary" findings mean that, in a mere five to thirteen years, by 1977 or 1985, the effect of *all* governmental actions that contributed to residential segregation had become attenuated to the point that the school board could revert to precisely the same school zones that had helped to create the segregation in the first place.

Respondents urged below, and continue to urge here, that this finding was clearly erroneous because it failed to take into account all of the testimony of petitioner's expert

upon whose opinion the court based its finding.[31] As set out in the Statement above, on both direct and cross examination Dr. Clark testified that because of "preference" that included at least an element of racial prejudice, whites would not move into a neighborhood that was more than 25-30% Afro-American. Thus, although some Afro-American families had, in the period 1972-1985, moved out of the ghetto created and maintained by state action, whites had not moved in. As Dr. Clark acknowledged, the refusal of whites to move in and thereby integrate the all-Afro-American schools re-established in 1985 was linked in significant degree to the past discriminatory actions by state and local governments and by the school board when it adopted neighborhood schools in the first instance.[32] The

[31] The court of appeals agreed that the district court's finding was clearly erroneous since its review of the entire evidence left it with "'the definite and firm conviction that a mistake has been committed.'" 890 F.2d at 1504.

[32] See pp. 20-22, *supra*.

district court simply ignored this part of Dr. Clark's testimony when it made its findings. While, as the finder of fact, the district court was free to credit the testimony of petitioner's expert, it could not accept some of that testimony and disregard, without explanation, the rest of it, particularly when it was consistent with the testimony as a whole and corroborated by that of respondents' expert.

Further, the conclusion of the district court that the effects of the school district's past discriminatory actions had become "attenuated beyond a shadow" was wrong as a matter of law. In Oklahoma City there were sixty-five years of state imposed segregated schools and fifty years of state enforced residential segregation that was exacerbated by seventeen years of "neighborhood" schools. It would be totally contrary to the spirit and intent of *Green* and *Swann* to conclude that a school district can escape its affirmative obligations to eliminate all vestiges of discrimination by

complying with a court decree that produces integration for one generation of students.[33] To argue that the same ten schools that are now all-Afro-American as were in 1972 are not vestiges of segregation is to ignore *Swann*'s recognition that the drawing of zone lines and the placement of schools are "potent weapon[s] for creating or maintaining a state-segregated school system." 402 U.S. at 21. There is simply no evidence in this record that meets the school board's burden of demonstrating that the natural effects of its policies from statehood to 1972 have been dissipated. As *Swann* holds:

> People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence

[33] It is similarly contrary to the holdings of *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972) and *United States v. Scotland Neck City Bd. of Ed.*, 407 U.S. 484 (1972) to hold that an action of a school board with a history of *de jure* segregation must have an invidious discriminatory motive in order to violate the affirmative duty to desegregate. Those decisions stand squarely for the proposition that if an action has the *effect* of hindering the process of desegregation then it must be enjoined. It cannot be denied that the action of petitioner here had precisely such an effect.

> the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

402 U.S. at 20-21. Precisely this occurred in Oklahoma City; the school board has done nothing to correct the underlying condition, which remains the most dramatic vestige of the dual system.

The district court sought to avoid this conclusion solely because some Afro-Americans had, as a consequence of federal, state, and local fair housing laws, been able to move into areas from which they had once been barred by law. But the fact that the proportion of Afro-Americans who live in the ghetto has declined because *some* residents were finally able to move out, in no way diminishes the fact that the ghetto, which was created by state and city law and intensified by acts of the school board, still exists because whites will not move into it.

To summarize, a school system that has operated state-mandated dual system segregated by race has a permanent and continuing obligation to take affirmative steps to either eliminate or neutralize the vestiges of that system. Once a violation has been shown, plaintiffs are entitled to a permanent injunction requiring such affirmative action. An injunction may be dissolved only upon the showing required by *Swift* or, in the alternative, by a showing that all vestiges have been fully eliminated so that an injunction is no longer necessary. The only consequence of a finding of "unitariness" consistent with this view is that a district court may relinquish active supervision of a school desegregation case subject to its being reopened if there is, as here, a deviation from the decree resulting in resegregation.

II.

ALTERNATIVELY, A FINDING OF UNITARINESS MAY TERMINATE THE OBLIGATION TO ADJUST PUPIL ASSIGNMENT PLANS TO ACCOUNT FOR DEMOGRAPHIC SHIFTS

If the Court decides to approve the procedure of making findings of "unitariness" that have more than the limited consequences we have urged above, then the appropriate effect of a finding of "unitariness" can be nothing more than to terminate the school board's and court's obligation to adjust pupil assignment plans from time to time. A "unitariness" finding cannot properly be treated as licensing the school board unilaterally to abrogate the plan that produced "unitariness" and to restore the *status quo ante*.

As noted above, this case does not involve a situation in which, after a school system has been found "unitary," subsequent demographic shifts create a new condition of racial isolation in the public schools, and the federal court

that oversaw desegregation is asked to order additional remedial measures to correct this new condition. That is the situation that was explicitly described in *Swann* when the Court said that at a certain point in a school desegregation case:

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

402 U.S. at 31-32.[34] See also *Pasadena City Board of Educ. v. Spangler*, 427 U.S. 424, 435-36 (1976). The Tenth Circuit took the view that in the situation contemplated by

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[34] The Court went on:

> This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Id., at 32.

Swann and *Spangler* no further judicial relief would be warranted, saying "a federal district court should not [thus] attempt an interminable supervision over the affairs of a school district." 890 F.2d at 1492 n. 17. For the purposes of the present argument II, we accept that premise.

In light of the premise, this case involves a situation that is the precise opposite of that contemplated by *Swann*. Here the school board is not seeking to retain a pupil assignment plan that produced an acceptable level of desegregation in the first instance and is later challenged as inadequate by litigants asking the court to "update" the plan to keep abreast of the latest population shifts.[35] To the contrary, here the school board itself acted unilaterally to *reverse* the pupil assignment plan that had made the system

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[35] Respondents put forward two proposed modifications of the Finger Plan only in response to the school board's action. Their purpose was to demonstrate that there were feasible means of maintaining desegregation in all of the elementary schools while meeting the ostensible reasons for reintroducing neighborhood schools in grades 1-4.

unitary; it *reinstated* geographic attendance zones that had been previously found by the district court to perpetuate and exacerbate racial segregation; and it thereby *restored* precisely the same pattern of racial separation in the schools that had existed before the unitariness finding was made.

As the court of appeals pointed out, "[i]t is uncontested that the contents of the [board's new] plan are contrary to the explicit dictates of the injunction" that produced desegregation (890 F.2d at 1492-93); and the new plan "has the effect of reviving those conditions that necessitated a remedy in the first instance" (890 F.2d at 1499). Specifically, the restoration of the previous geographic zoning scheme re-created virtually all-Afro-American student bodies in ten elementary schools that had been found to be identifiably Afro-American in 1972. Concomitantly, 13 schools that had student bodies 99.5% to 100% white in 1971-1972 had student bodies from 80% to 86.2% white in

1985-86, in a school district that is only 50.7% white.[36]

A finding of "unitariness" at the least supposes that a school board will continue to keep faith with the foundations of the finding. It does not empower the board to topple those foundations, resurrect conditions of racial segregation, and then insist that the conditions are beyond judicial correction unless the board is proven to have acted with an invidious discriminatory motivation in turning the clock back. Such a result is wholly inconsistent with the mandate of *Green v. School Board of New Kent County*, 391 U.S. 430, 438 (1968) that *all* vestiges of the prior segregated system be eliminated "root and branch," as well as the holdings of *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972), and *United States v. Scotland Neck City Bd. of*

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[36] The thirteen schools are Adams, Buchanan, Coolidge, Fillmore, Hays, Hillcrest, Kaiser, Lafayette, Linwood, Prairie Queen, Quail Creek, Rancho, and Ridgeview. Compare the tables at 338 F. Supp. at 1260, showing the 1971-72 enrollments, and at 677 F. Supp. at 1509-10, showing the 1985-86 enrollments.

Educ., 407 U.S. 484 (1972), that actions by a school system that is under the duty to desegregate must be judged by their effect, rather than by their purpose.

III.

ALTERNATIVELY, A SYSTEM CAN BE "UNITARY" ONLY UPON A FINDING THAT IT WILL REMAIN SO IN THE FACE OF *ANY* CHANGES IN PUPIL ASSIGNMENT POLICIES

Petitioner takes the position that a finding of "unitariness" should be given the effect of forbidding district courts to review and correct school board actions that re-introduce conditions of racial isolation except upon a showing of a new constitutional violation committed with racially discriminatory motivation. This position, however, is fundamentally at odds with the holdings of *Wright v. Council of City of Emporia*, *supra*, and *United States v. Scotland Neck City Bd. of Educ.*, *supra*, unless the finding has been entered on the basis of underlying factual findings

that the system will remain unitary in the face of *any* non-invidiously motivated change in pupil assignment procedures that the board may subsequently adopt, including immediate reversion to the *status quo ante*.

The logic under which the petitioner and the district court argue that the 1977 "unitariness" finding authorized the board to abandon the pupil assignment plan that had made the school district "unitary" and to regress to an earlier neighborhood attendance zone scheme -- namely, that after a finding of "unitariness' a school board is free to do whatever it wants in the way of pupil assignment so long as it is not shown to be acting with a segregative purpose -- would equally justify the same regressive action by a school board on the first day after a unitariness finding is entered.

But if this is to be the *consequence* of a unitariness finding, then the *meaning* of a unitariness finding must fit the consequence. The meaning must be that a school system

has become sufficiently stabilized as a unitary one that it will remain unitary even on the supposition that the school board reverts, the very next day, to the identical geographic zones that previously had to be abolished to achieve desegregation. For example, if the "unitary" finding in this case had been based on underlying findings that over the years the Afro-American ghetto had been substantially integrated and that the Afro-American population was distributed throughout the school district, such a finding would permit the school district to re-adopt the earlier geographic zones since the system would remain "unitary."

Thus, at a *minimum* the district court must conduct a searching inquiry into the status of the system overall and make findings as to each of the factors identified in *Green v. New Kent County School Bd.*, 391 U.S. at 435, *Swann*, 402 U.S. at 18-21, and *Milliken v. Bradley*, 433 U.S. 267 (1977) as indicia that the vestiges of the prior system have been

removed and not simply neutralized by the desegregation plan. As *Green* admonishes (391 U.S. at 439), such an inquiry and findings must be specific to the case and not simply be a declaration of "unitariness" in the abstract.[37] Thus, a predicate is a hearing at which the parties and the court would investigate in detail whether *all* the circumstances that led to the entry of the order in the first place had been dissipated in fact. The burden would at all times be on the school district to demonstrate that none of the conditions that were indicia of a dual system remained.

Of course, given the facts in this case the 1977 "unitariness" finding could not and did not meet these standards. The district court itself, both through its questions at the 1975 hearing and its statement when it

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[37] As noted in the Brief *Amici Curiae* of the Council of the Great City Schools, *et al.*, at pages 13- 15, the inquiry must include a determination that the school district has fully complied with all outstanding court orders and has demonstrated its good faith commitment to carrying out its constitutional obligations.

terminated the case in 1977, expressed the clear expectation that the school board would *not* revert to the same zones if the system were found to be unitary and the case dismissed. Even after eight years, however, when the board did go back to the same zones the result was to recreate the same segregated schools that the plan was instituted to abolish since the state-created ghetto that required the entry of the plan was still in existence. Thus, it is impossible to conclude that all vestiges of the prior *de jure* segregated system had been eliminated "root and branch."

Therefore, this Court should conclude that the district court's unitariness finding was not based on a sufficient factual predicate and affirm the decision of the Tenth Circuit. At the least, the case must be sent back to the Tenth Circuit to determine the meaning of the various "unitariness" findings made by the district court and review them under the legal standard set out in this Part III.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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